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Date: July 18, 2002

Case No.: 96-STA-5

In the Matter of

ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,

Prosecuting Party

and

KENNETH BURKE,

Complainant

v.

C.A. EXPRESS, INC.,

Respondent

Appearances:

Anthony G. O'Malley, Esquire
For the Secretary

Clayton S. Morrow, Esquire
For the Respondent

Before: GERALD M. TIERNEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 405 (employee protection provision) of the Surface Transportation Assistance Act of 1982 ("STAA") (codified at 49 U.S.C. § 31105). Congress included Section 405 in the Surface Transportation Assistance Act to insure that employees in the commercial motor transportation industry who make safety complaints, participate in STAA proceedings, or refuse to commit unsafe acts, do not suffer adverse employment consequences because of their actions. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060 (5th Cir. 1991) (citing

128 Cong. Rec. 29192, 3251 (1982)).¹ The Act prohibits discipline of trucking employees who raise violations of commercial motor vehicle rules on the part of trucking companies, recognizing that drivers are often in the best position to detect when an operation is not running safely but that employees often may not report violations for fear of backlash from their employers. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987); *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980 (4th Cir. 1993) *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356 (6th Cir. 1992); *Lewis Grocer Co. v. Holloway*, 874 F.2d 1009, 1011 (5th Cir. 1989).

Kenneth E. Burke ("Complainant") was employed by C.A. Express, Inc. ("Respondent"), a commercial motor vehicle operator, as a truck driver from February 28, 1994, until December 21, 1994, when the Respondent terminated him from employment. On January 4, 1995, the Complainant filed a complaint alleging discriminatory termination with the Secretary of Labor. The Secretary of Labor investigated the complaint and determined that there was reasonable cause to believe that the Respondent violated Section 31105. (GX 8).² The Respondent denied the Secretary's findings and objected to the Preliminary Order of the Secretary, and requested a formal hearing. Formal hearings were held in Pittsburgh, Pennsylvania on March 5, 1996, April 15, 1996, and June 12, 1996.

STIPULATIONS

The Respondent, C.A. Express, Inc., has engaged in commercial motor vehicle operations and maintains a principal place of business in Central City, Pennsylvania. In the regular course of business, the Respondent's employees operate commercial motor vehicles over interstate highways connecting routes principally to transport cargo. At all material times herein, the Respondent is a "person" as defined by the Act. 49 U.S.C. § 2301(4).

On or about February 28, 1994, the Respondent hired the Complainant, Kenneth Burke, as a driver of commercial motor vehicles; namely, a tractor trailer with a gross vehicle weight of 10,000 or more pounds. At all material times, the Complainant was an employee of the

¹ Furthermore, Congress enacted the STAA to combat the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents" on the nation's highways. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting remarks of Sen. Danforth and summary of proposed statute at 128 Cong. Rec. 35209, 32510 (1982)); *see also Lewis Grocer Co. v. Holloway*, 874 F.2d 1009, 1011 (5th Cir. 1989) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles.")

² Record references are indicated as follows:

GX	-	Government Exhibit
RX	-	Respondent's Exhibit
Tr.1	-	Hearing Transcript, March 5, 1996
Tr.2	-	Hearing Transcript, April 15, 1996
Tr.3	-	Hearing Transcript, June 12, 1996

Respondent; namely, Complainant was a driver of a commercial motor vehicle with a gross vehicle weight of 10,000 or more pounds used in on the highways in commerce to transport cargo directly affecting commercial motor vehicle safety. 49 U.S.C. § 2301(2)(a).

On or about January 4, 1995, the Complainant timely filed a complaint with the Secretary of Labor alleging that the Respondent had discriminated against him in violation of Section 31105 of the Act. 49 U.S.C. § 31105. The Secretary of Labor, acting through its authorized agents, investigated the complaint in accordance with Section 31105(c)(2)(A).

The Complainant reported vehicle deficiencies to the Respondent in accordance with 49 C.F.R. §§ 395.8 and 396.11, an activity protected by Section 31105 of the Act. The Respondent terminated the Complainant from employment. At the time of termination, the Complainant earned \$13.95 per hour, plus hospitalization of \$1.29 per hour and pension benefit of \$0.89 per hour.

FINDINGS OF FACT

On January 1, 1994, the Respondent began performance of a contract to transport mail for the United States Postal Service between Philadelphia, Pennsylvania and Pittsburgh, Pennsylvania. (Tr.1 at 301). On February 28, 1994, the Respondent hired the Complainant to drive its commercial vehicles transporting mail on the Philadelphia-Pittsburgh route.

The Respondent, by and through Charles C. Auckerman, Jr. ("Mr. Auckerman"), owner of C.A. Express, conducted a safety meeting for its drivers in May of 1994. (Tr.1 at 304-05; Tr.2 at 20). At the meeting, Mr. Auckerman provided the drivers with written materials instructing how to prepare driver inspection reports. (Tr.1 at 305; GX 3). Mr. Auckerman instructed the drivers not to write up any defects that would "redline" or "deadline"³ a vehicle and informed the drivers that a driver who redlined or deadlined a truck would not have a job with Respondent anymore. (Tr.1 at 15, 16; Tr.3 at 8-9). Mr. Auckerman denied that he ever told his drivers that they would be fired if they deadlined a truck. (Tr.1 at 310). Mr. Auckerman also denied that he instructed the Complainant to refrain from reporting serious deficiencies on driver inspection reports. (Tr.1 at 311).

Mr. Auckerman also presented a company discipline program which assessed points to drivers who improperly completed logs and driver inspection reports. (GX 3). After a certain number of points was assessed against a driver, then that driver would face action under the disciplinary program. (Tr.1 at 18-20). Respondent never assessed points against the Complainant. (Tr.1 at 39, 332).

Drivers were required to telephone Mr. Auckerman before commencing a shift, in the

³ "Deadline" and "redline" refer to violations that would prevent a truck from operating safely on the nation's highways. (Tr.1 at 15-16).

middle of the job, and at the day's end. (Tr.1 at 310). Mr. Auckerman testified that this system enabled him to become apprised of safety concerns before receiving the inspection reports, which could take 48 hours to receive. (Tr.1 at 310).

During the course of his employment, the Complainant made numerous complaints to Mr. Auckerman concerning the safety of the vehicles he was assigned to drive. Complaints were made both orally and through daily driver inspection reports prepared by the Complainant pursuant to federal regulations. At the end of each day's work transport, each driver is required by regulations of the United States Department of Transportation ("DOT") to visually inspect the assigned vehicle for certain safety deficiencies. 49 C.F.R. § 396.11.⁴ Noted deficiencies are recorded on forms commonly referred to as driver inspection reports. The regulations enumerate certain equipment that must be reported on. 49 C.F.R. § 396.11(a). The record contains numerous driver inspection reports prepared by the Complainant which evidence that several of the Respondent's vehicles exhibited safety deficiencies.⁵ The record contains "Driver's Inspection Reports" that identify safety deficiencies reported by the Complainant to the Respondent that relate to steering, horns, lights, tires, mirrors, and shocks. (EX 1; GX 1; GX 2b). A report prepared by the Complainant on December 19, 1994 revealed a truck with shaky steering, a leaking steering box, bad rear tires, and bad front shocks. (Tr.1 at 28-29).

The Complainant testified that the Respondent failed to repair the trucks that were identified as having safety defects. (Tr.1 at 61). The Complainant further testified that conditions of the vehicles progressed to the point where he feared to take the trucks on the road. (Tr.1 at 61-2).

The Complainant testified that his previous employers instructed drivers to write up every deficiency on the inspected truck. (Tr.1 at 24). In comparison, Mr. Auckerman instructed the Complainant to refrain from indicating serious problems on the driver inspection reports. (Tr.1 at

⁴ The regulations require, in pertinent part, that the driver inspection report "... identify the motor vehicle and list any defect or deficiency discovered by or reported to the driver which would affect safety of operation of the motor vehicle or result in its mechanical breakdown" 49 C.F.R. § 396.11(b) (1994). Furthermore, the regulations provide that, before driving a motor vehicle, the driver must be "satisfied that the vehicle is in safe operating condition." 49 C.F.R. § 396.13(a) (1994). However, Mr. Auckerman apparently disregarded this mandate, testifying that he considers a vehicle safe according to the DOT regulations, and not on a driver's interpretation. (Tr.1 at 311).

⁵ The vehicle inspection reports are dated December 2, 1994 (vehicle 14), December 4, 1994 (vehicle 12), December 5, 1994 (vehicle 12), December 6, 1994 (vehicle 14), December 9, 1994 (vehicle 16), December 10, 1994 (vehicle 14), December 13, 1994 (vehicle 14), December 14, 1994 (vehicle 14), December 15, 1994 (vehicle 14), December 17, 1994 (vehicle 14), December 18, 1994 (vehicle 15), December 19, 1994 (vehicle 14), and December 20, 1994 (vehicle 12). (EX 1; GX 1; GX 2b).

25). Mr. Auckerman instructed his drivers to identify and report only those safety issues that were required by federal law. (Tr.1 at 211, 264-5, 315; Tr.2 at 20). Moreover, Mr. Auckerman required his drivers to notify him in person or by telephone before “redlining” any vehicle, and criticized the Complainant for including too much information on the reports. (Tr.1 at 25, 26).

The Complainant’s testimony also reflects that, in July of 1994, he told Mr. Auckerman that he did not want to take a truck out on a run because of an expired inspection sticker, and that the same truck had been deadlined by another driver and repairs were not made to the vehicle. (Tr.1 at 33). In response, Mr. Auckerman replied that the Complainant should drive the truck or would lose his job. (Tr.1 at 34). The Complainant then drove the truck even though he deemed it unsafe. Mr. Auckerman responded that the Complainant continually listed vehicle tires as “worn” and did not include tread depth measurements on his reports, although the tires were within the prescribed limits of the DOT regulations. (Tr.1 at 314-15). Mr. Auckerman stated that all repairs are made eventually, based on the seriousness of the necessary repair.⁶ (Tr.1 at 315).

Mr. Auckerman testified that, in July of 1994, the Respondent was late for six trips out of 228 during that accounting period, prompting the Post Office to send Mr. Auckerman a letter stating that the postal contract would be lost if service did not improve over the next 28 day period.⁷ (Tr.1 at 306).

The testimony of several of the Respondent’s former drivers substantiates the events testified to by the Complainant.

Charles E. Pflugh, former driver for the Respondent, testified that, during the early part of July, 1994, he identified several safety deficiencies on that vehicle he was assigned to drive; namely, the vehicle did not have an inspection sticker, had bald tires, and the back shocks were broken. (Tr.1 at 158-59). Pflugh testified that he drove the vehicle because he did not think that Mr. Auckerman would make the necessary repairs and would instruct Pflugh to run the vehicle despite the safety deficiencies. (Tr.1 at 159). During his run, Pflugh had occasion to speak to Mr. Auckerman via telephone and informed him of the safety deficiencies. Pflugh testified that Mr. Auckerman disregarded his safety concerns and instructed him to run the vehicle. (Tr.1 at 159). Respondent did not assign Pflugh any driving runs during the following week and terminated Pflugh from employment on July 10, 1994. (Tr.1 at 160, 161-62). Pflugh spoke with Mr. Auckerman concerning his termination, and Pflugh testified that Mr. Auckerman stated to him that he was not permitted to redline the Respondent’s vehicles. (Tr.1 at 167, 172). Mr. Auckerman responded that Pflugh was terminated for “stealing company operating money and

⁶ The DOT regulations provide that a motor carrier must take corrective action of any safety deficiency noted on the vehicle inspection report “that would be likely to effect the safety of operation of that vehicle.” 49 C.F.R. § 396.11(c) (1994).

⁷ The record does not reflect which of the Respondent’s drivers were responsible for the late runs.

failure to turn in his paperwork and fill out his paperwork.” (Tr.1 at 318).

Richard L. Webb, former driver for the Respondent, worked for the Respondent until June 4, 1994. (Tr.3 at 6). Webb testified that Mr. Auckerman informed the drivers at the safety meeting that the Respondent did not have new equipment and that they would have to make do with what they had. (Tr.3 at 8). Webb further testified that Mr. Auckerman instructed the drivers not to put any information on the driver inspection reports that was not required by the DOT regulations. (Tr.3 at 10). Webb testified regarding an incident in which he informed Mr. Auckerman that a truck he was assigned to drive did not have operational taillights. Mr. Auckerman instructed Webb to operate the vehicle with the four-way blinkers on to complete the run. When Webb informed Mr. Auckerman of the illegality of that procedure, Mr. Auckerman informed Webb that he was to drive the vehicle or be fired. (Tr.3 at 12, 14).

William Hawes, former driver for the Respondent, testified that Mr. Auckerman instructed the drivers not to indicate anything in the driver reports that was not required by the DOT regulations. (Tr.1 at 187). Hawes testified that, at the May safety meeting, Mr. Auckerman told the drivers that they were to contact him if they uncovered a vehicle thought to be unsafe and that Mr. Auckerman was solely empowered to determine whether the vehicle should be taken out of service. (Tr.1 at 189). On one occasion, Hawes informed Mr. Auckerman that the vehicle he was assigned to drive had two flat tires, which prompted Mr. Auckerman to instruct Hawes to park the vehicle so that Mr. Auckerman could provide another driver to make the run. (Tr.1 at 190). Hawes interpreted this statement to mean that he would be fired if he failed to make the run. (Tr.1 at 190). Hawes was terminated on December 21, 1994. Hawes requested that Mr. Auckerman provide a reason for the termination, and Mr. Auckerman responded, “. . . there’s a lot of reasons. Nothing big, but there’s a lot of reasons.” (Tr.1 at 198).

Elizabeth Ellen Hammerle, former driver for the Respondent, testified that she reported vehicle safety deficiencies to Mr. Auckerman, but that repairs were seldom made in response to her reports and Mr. Auckerman told her that she was putting too much information on the driver inspection reports. (Tr.1 at 208). Hammerle testified that Mr. Auckerman told her to refrain from reporting information not required by the DOT. (Tr.1 at 208-09). In particular, Hammerle repeatedly reported a tire that needed to be replaced, but Mr. Auckerman responded that the tire was acceptable. (Tr.1 at 209). The tire was not replaced for over a month. (Tr.1 at 211). Additionally, Hammerle repeatedly reported marker lights on the top of the truck as being inoperable, and said lights were not repaired for several weeks. (Tr.1 at 211). This prompted Hammerle to reduce the amount of information she placed on the driver inspection reports, such as dashboard lights and mirrors, although she was compelled to drive the vehicle at night without operating dashboard lights. (Tr.1 at 210, 213).

The only testimony tending to support the events as depicted by Mr. Auckerman is that of Kevin Newman, current employee of the Respondent.

Kevin Newman was hired by the Respondent as a driver on July 25, 1994. (Tr.1 at 259-

60). Newman testified that the Complainant discussed slow down activities when Newman rode with the Complainant from a drop off point to where Newman parked his car. (Tr.1 at 261). Specifically, Newman testified that, in the fall of 1994, the Complainant stated that if the drivers showed up late then the Respondent would lose its postal contract, and that the drivers could then drive for the company that picks up the postal contract. (Tr.1 at 261). Newman testified that he informed Mr. Auckerman of the Complainant's remarks. (Tr.1 at 262). Newman denied that Mr. Auckerman told him to not fill out the driver reports properly, that Mr. Auckerman encouraged him to not list certain safety deficiencies, and that repairs were not made in a timely manner. (Tr.1 at 264-65).

On December 21, 1994, Mr. Auckerman telephoned the Complainant and terminated him from employment with Respondent. (Tr.1 at 35).

James Raymond Connell, investigator for the Occupational Safety and Health Administration, investigated the Complainant's termination complaint. (Tr.1 at 220). On January 26, 1995, Connell contacted Mr. Auckerman, who stated to Connell that the Complainant was fired for attempting to get other drivers to cause a slow down. (Tr.1 at 220; Tr.2 at 17, 32). Connell requested a written response from Mr. Auckerman. (Tr.1 at 221). The written response recites bad attitude, paperwork errors, and resistance to new federal regulations as explanation for Complainant's termination. (Tr.1 at 224). Connell's investigation consisted of interviews of Pflugh, Webb, and Hawes. (Tr.1 at 225).

William J. Syme, special agent with the Federal Highway Administration, U.S. Department of Transportation, investigates motor carrier safety activities, and testified at hearing that the daily vehicle inspection reports prepared by the Complainant comport with the DOT regulations. (Tr.1 at 142; GX 2-B). *See* 49 C.F.R. § 396.11. Syme testified that the Complainant prepared detailed reports that contained some extraneous information. (Tr.1 at 151).

LEGAL DISCUSSION

The STAA prescribes discriminatory employment practices against drivers engaged in reporting or refusing to drive unsafe vehicles.

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because--

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105 (West 1997). Particularly relevant to the present complaint is paragraph 2 of Section 31105, insofar as it relates to a driver's perceived threat of danger due to the operation of a commercial vehicle. A driver's perceived apprehension of an unsafe condition is measured in terms of objective reasonableness "in light of the situation that confronted the employee at the time." *Yellow Freight Systems, Inc. v. Reich (Thom)*, 38 F.3d 76, 82 (2nd Cir. 1994).

The United States Supreme Court has summarized the three-prong burden-shifting analysis applicable to employment discrimination cases, such as the STAA,⁸ in the following manner:

First, the [complainant] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the [complainant] succeeds in proving the prima facie case, the burden shifts to the [respondent] to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the [respondent] carry this burden, the [complainant] must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [respondent] were not its true reasons, but were a pretext for discrimination.

Texas Dept. Of Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *Accord Keller v. Orix Credit Alliance, Inc.*, 105 F.3d 1508 (3rd Cir. 1997).

PRIMA FACIE CASE

A prima facie case of discrimination under the STAA requires proof, by a preponderance of the evidence, of three elements: (1) that he engaged in protected activity; (2) that he was subjected to adverse action; and, (3) that a causal link exists between the protected activity and the employer's adverse action. *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir.

⁸ See *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (*McDonnell Douglas* burden-shifting analysis applicable to STAA).

1994). *See also Watson v. Smallwood Trucking Company, Inc.*, 94-STA-3 (Sec'y Oct. 6, 1994). The Complainant must also present evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992).

The Respondent concedes the existence of the first two elements of a prima facie case, protected activity and adverse employment action, but challenges a finding that there is a causal connection between the Complainant's protected activity and his termination from employment.

INFERENCE OF CAUSATION

The temporal proximity between the protected STAA complaints and the disciplinary action raised an inference of causation sufficient to establish a prima facie case of unlawful discrimination. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). Yet, temporal proximity alone will not support an inference of causation where compelling evidence exists that the Respondent encouraged safety complaints. *Moon*, 836 F.2d at 229.

The testimony and documentary evidence of record disclose a general pattern of safety complaints reported to Mr. Auckerman, Mr. Auckerman generally ignoring the concerns of drivers, and Mr. Auckerman implicitly threatening drivers with termination for refusal to drive a vehicle with a safety deficiency. Mr. Auckerman's conduct towards the Complainant fits that general pattern.

In this case, there is a clear temporal connection between the Complainant's reasonable reporting of perceived vehicle safety defects and the adverse discriminatory action. A very close temporal connection exists between the driver inspection reports prepared by the Complainant throughout December of 1994 and his termination. The Respondent's explanation of the timing of the termination, i.e., that Mr. Auckerman resisted terminating the Complainant until after the busy holiday season, is supported only by Mr. Auckerman's vague testimony to that effect. Mr. Auckerman merely stated he could only afford to terminate the Complainant and Hawes after the increased routes, and such explanation bears a more remote connection to the termination than does the temporal causal inference based on the documentary evidence of record. I do not find Mr. Auckerman's testimony on this issue credible, in light of his general disregard for the complaints made by his drivers, the veiled threats of termination made to numerous drivers, and temporal proximity of the continued and repeated safety concerns raised by the Complainant and his termination. The Complainant has raised an inference of causation sufficient to sustain his burden of establishing a prima facie case.

Therefore, I find that the Complainant has demonstrated, by a preponderance of the evidence, a prima facie case of discrimination under Section 31105 of the Surface Transportation

Assistance Act.

RESPONDENT'S REASON FOR TERMINATION

The Respondent asserts that its reasons for terminating the Complainant from employment are not discriminatory. The Respondent asserts that it terminated the Complainant for “attempting to undermine and sabotage” the Respondent’s postal contract, as well as poor attitude and continuous paperwork errors. (Respondent’s Brief at 13, 18). The Respondent has met its limited burden of rebuttal by proffering legitimate non-discriminatory reasons for the Complainant’s termination.

DISCRIMINATORY REASONS FOR TERMINATION

The Complainant may prevail on his complaint of discriminatory termination upon a showing that the reasons for termination proffered by the Respondent were a mere pretext for discriminatory animus. A pretext is defined as an “[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense.” BLACK’S LAW DICTIONARY 1187 (6th ed. 1991). The Supreme Court has recognized the tendency of a proffered reason for termination to camouflage discriminatory animus.⁹ *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Each of the Respondent’s proffered reasons will be treated *seriatim*.

The Second Circuit has held that pretext can be demonstrated by “evidence of inconsistencies or anomalies that could support an inference that *the employer did not act for its stated reason.*” *Keller*, 105 F.3d at 1523 (quoting *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3rd Cir. 1995)) (emphasis in original).

⁹ The Court explained,

we are willing to presume this largely because we know from experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we assume generally acts with some reason, based his decision on an impermissible consideration . . .

Furnco Construction Corp., 438 U.S. at 577. This consideration prompted the Supreme Court to adopt the well-known *McDonnell Douglas* burden-shifting analysis. *Keller v. Orix Credit Alliance, Inc.*, 105 F.3d 1508, 1518 (3rd Cir. 1997).

The Complainant testified that Mr. Auckerman informed him that the reason for the Complainant's termination was writing reports that were too inclusive. (Tr.1 at 25). Mr. Auckerman denied terminating the Complainant due to reporting safety deficiencies; rather, he asserted that he told the Complainant that the reason for termination was the Complainant's and Hawes' attempts to cause the Respondent to lose the postal contract. (Tr.1 at 311).

Complainant states that Mr. Auckerman informed him that the reason for termination was the detailed reports identifying safety deficiencies in Respondent's trucks. (Tr.1 at 36, 95).

Mr. Auckerman testified that he terminated the Complainant on December 21, 1994 because he felt that the Complainant reached "strike three". (Tr.1 at 306, 314).

Slow Down Activities

The Respondent asserts that the Complainants alleged attempts to "sabotage" Respondent's postal contract through a slow down as a non-discriminatory reason for terminating the Complainant's employment. (Tr.1 at 261-62). Connell did not inquire as to what Mr. Auckerman meant by "backstabbing." (Tr.2 at 35). Hammerle denied that the Complainant approached her concerning the alleged slow down. (Tr.1 at 210). Webb has no knowledge of the alleged slow down activities or solicitation of same that Mr. Auckerman attributed to the Complainant. (Tr.3 at 17).

Mr. Auckerman testified that he first heard of the alleged slow down in October of 1994 from Hammerle after she was terminated. (Tr.1 at 312). Newman approached Mr. Auckerman in November regarding the slow down. (Tr.1 at 312). Mr. Auckerman testified that three drivers approached him in the prior month regarding the Complainant's alleged solicitation of drivers for a slow down. (Tr.1 at 306). Mr. Auckerman also testified that he approached two other drivers, each of whom confirmed that the Complainant and Hawes were attempting a slow down. (Tr.1 at 306).

On December 21, 1994, the Respondent terminated the Complaint and driver William Hawes for "conspiring to sabotage" the Respondent's postal contract. (Tr.1 at 200, 306-07). The Respondent declined to terminate the Complainant during its busy holiday season, and instead, waited until the conclusion of the holiday rush to terminate the Complainant. (Tr.1 at 313-14). Hawes testified that the Respondent never identified a "slow down conspiracy" as a reason for his termination, and Hawes further testified that he never discussed the same with Newman or any other individual. (Tr.1 at 199-200).

The Respondent further argues that the Complainant's alleged slow-down activities were not covered by the company disciplinary program. (GX 3 at 6-7). The disciplinary program was crafted to assist driver's compliance with federal regulations.

The Complainant denied that he attempted to cause a slow down that would cause the Respondent to lose its postal contract, and further testified that doing such would cause him to lose a good paying job with benefits. (Tr.1 at 121-22). As far as the alleged slow down conversation with Mr. Newman, the Complainant denied that the two conversed about anything other than payroll problems. (Tr.1 at 123-24; Tr.2 at 28).

The only evidence of record substantiating the Respondent's "sabotage conspiracy" theory is the testimony of Mr. Auckerman and Newman. The record does not support this conclusion. This testimony is in direct conflict with that of the Complainant, Hammerle, Webb, and Pflugh. Mr. Auckerman never broached the slow down with the Complainant, nor with Hawes before their terminations on December 21, 1994. Mr. Auckerman testified that he referred to the slow down activity in his initial conversation with investigator Connell and in his formal response letter with the reference to Complainant as a backstabber. Nonetheless, the sabotage explanation finds little support in the record. The record does not indicate that Mr. Auckerman confronted the Complainant with the information he then possessed concerning the alleged slow down. Nor does the record indicate that the Complainant, or any witness testifying on his behalf, was ever cited by the Respondent for causing a run to be late.

Frankly, the "sabotage" explanation does not find support in the credible testimony presented at hearing. In sum, Mr. Auckerman never confronted the Complainant, never cited him for running late, and, as Mr. Auckerman testified, terminated the Complainant on the basis of information provided by Newman. Hammerle's testimony contradicts Mr. Auckerman's in that Hammerle denies knowledge of a slow down, whereas Mr. Auckerman identifies Hammerle as one the drivers who brought the slow down to his attention. It defies logic that an employer would dismiss an employee based on innuendo solicited from one named and four drivers that Mr. Auckerman could not recollect and did not testify at the hearing. Indeed, there is no evidence in the record that any slow down activities were undertaken by any of the Respondent's drivers.

I reject the Respondent's proffer of the alleged slow down conspiracy as a legitimate reason for the Complainant's termination as not credible and not supported by the evidence. The Complainant has sustained its burden of demonstrating that the slow down reason proffered by the Respondent was a pretext for its discriminatory termination of the Complainant.

Paperwork Errors, Bad Attitude and Resistance to Changed Regulations and Policy

The Respondent asserts that the Complainant was terminated for non-discriminatory reasons; namely, failure to correct numerous paperwork errors, failure to improve his bad attitude¹⁰ and failure to adhere to changes in federal regulations and company policy. (Tr.1 at

¹⁰ Mr. Auckerman testified that in November of 1994 the Complainant requested time off for three days so that he could go deer hunting. (Tr.1 at 307). Mr. Auckerman denied the request due to an excess delivery schedule due to the holiday rush. (Tr.1 at 307). Mr.

306-10). The Complainant testified that the reason Mr. Auckerman provided for the termination was his preparation of driver inspection reports. (Tr.1 at 125). Connell did not inquire as to what Mr. Auckerman meant by his statement regarding poor attitude and resistance to changes. (Tr.2 at 35).

The record does not support a finding that the Complainant was terminated for possessing a bad attitude. Neither Mr. Auckerman or any other witness testified that the Complainant was fired for having a bad attitude, nor do any documents of record reflect that fact.

Similarly, the explanation that the Complainant was terminated for resisting changes to company policy and company regulations finds little support in the record. Presumably, the Respondent postures this argument on testimony that the Complainant prepared driver inspection reports that were too inclusive in that they contained observations which Mr. Auckerman deemed no longer required by the DOT regulations. The testimony of both Mr. Auckerman and the Complainant supports the fact that the Complainant prepared meticulous and detailed inspection reports. The Complainant's subjective perception of vehicle safety is afforded protection by the STAA and, indeed, is mandated by the DOT regulations. *See* 49 U.S.C. § 31105(2); 49 C.F.R. § 396.11(c).

Moreover, the Respondent's stated reason that the Complainant was terminated for improper completion of logs bears only a tenuous connection to the record.

The evidence demonstrates that the Complainant was terminated for engaging in a protected activity; namely, reporting safety concerns and violations to his employer in accordance with the DOT regulations. This fact is supported by the similar actions taken by Mr. Auckerman against other drivers who engaged in similar activities. *Compare* 3 A. Larson & L. Larson, *Employment Discrimination* § 87.31 (1986) at 17-123 ("The employer's position is also bolstered by evidence that, although other employees have made similar protests ..., there was no pattern of retaliation against such employees.").

Accordingly, I reject the Respondent's remaining proffered reasons for the Complainant's termination

CONCLUSION

Complainant has shown that the Respondent's termination of his employment based on paperwork errors, poor attitude, resistance to changes in federal regulations, and alleged slow down activities were a pretext for discrimination. At no time did the Respondent utilize the company discipline program or otherwise discipline the Complainant for these stated infractions.

Auckerman testified that the Complainant called in sick and stated he was taking a couple of days off, which corresponded to the days he originally requested off. (Tr.1 at 308). However, the Respondent has not connected this incident to any of its reasons for terminating the Complainant.

Moreover, the sabotage conspiracy proffered by the Respondent is not supported by the evidence or by logical inference therefrom.

BACK PAY

After he was terminated from employment with the Respondent, the Complainant sought employment with other commercial carriers. However, he was unable to secure employment that paralleled the working conditions at C.A. Express. (Tr.1 at 51). Specifically, many of the available jobs did not provide the same work schedule which permitted the Complainant sufficient time with his family, nor did alternate positions provide the same rate of pay, pension benefits, or medical benefits. (Tr.1 at 51). By the end of February, 1995, the Complainant was hired on a part time basis by R.M. Neff. (Tr.1 at 51-2). On April 30, 1995, the Complainant was hired as a full-time driver by Allegheny Ludlum Corporation, his current employer. (Tr.1 at 53).

The Complainant is granted back pay as a result of the Respondent's discriminatory termination. Back pay awards under the STAA are calculated in accordance with the remedial scheme embodied in Section 706 of Title VII of the Civil Rights Act of 1964.¹¹ *Polger v. Florida Stage Lines*, 94-STA-46 (ARB Mar. 31, 1996). Connell computed the Complainant's back wages from the time of his termination until February 18, 1995, and arrived at \$5,754.48. (Tr.1 at 231-34). The only evidence of record indicating the Complainant's entitlement to back wages is Connell's testimony and the earning records contained at GX 4 & 9. The Respondent objects to the entitlement to back wages, but does not proffer evidence supporting a conclusion different than that reached by Connell, whose calculations are consistent with the law. I find that the Complainant is entitled to back pay in the amount of \$5,754.48.

CONCLUSIONS OF LAW

1. The Surface Transportation Assistance Act governs the parties and the subject matter.
2. The Complainant demonstrated that he was engaged in protected activity when he made complaints to the Respondent regarding the safety of the Respondent's vehicles.
3. The Complainant demonstrated that he suffered adverse employment actions when he was terminated.
4. The Complainant presented sufficient evidence to raise the inference that

¹¹ 42 U.S.C. § 2000e et seq. (1988).

the protected activity was the likely reason for the adverse action.

5. The Respondent demonstrated a legitimate non-discriminatory reason for its termination of the Complainant.
6. The Complainant demonstrated that the Respondent's proffered reason for the Complainant's termination was not the true reason through a showing that the termination was more likely motivated by a discriminatory reason.
7. The Complainant is entitled to back pay in the amount of \$5,754.48.

RECOMMENDED ORDER

Based on the forgoing, IT IS HEREBY RECOMMENDED that the complaint of Kenneth Burke be GRANTED.

GERALD M. TIERNEY
Administrative Law Judge

GMT/JWC/ir

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C., 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).